

AMENDED IN ASSEMBLY SEPTEMBER 4, 2013

AMENDED IN ASSEMBLY AUGUST 19, 2013

AMENDED IN ASSEMBLY AUGUST 7, 2013

AMENDED IN SENATE APRIL 23, 2013

AMENDED IN SENATE APRIL 16, 2013

SENATE BILL

No. 465

Introduced by Senator Correa

February 21, 2013

An act to amend Sections 12606 and 12606.2 of the Business and Professions Code, and to amend Section 110375 of the Health and Safety Code, relating to packaging and labeling.

LEGISLATIVE COUNSEL'S DIGEST

SB 465, as amended, Correa. Packaging and labeling: containers: slack fill.

~~(1) Existing~~

Existing law establishes the Department of Food and Agriculture and sets forth its powers and duties, including, but not limited to, enforcement of the Fair Packaging and Labeling Act. The act prohibits specified persons from distributing any packaged commodity that is not in conformity with prescribed packaging and labeling requirements, except as provided. The act prohibits a container wherein commodities are packed to have a false bottom, false sidewalls, false lid or covering, or to be constructed or filled as to facilitate the perpetration of deception or fraud. The act prohibits a ~~container~~ *commodities container, or a food container subject to the Federal Food, Drug, and Cosmetic Act* from being made, formed, or filled as to be misleading. The act provides that

a container that does not allow a consumer to fully view its contents violates this provision if it contains nonfunctional slack fill. The act provides that nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for other than specified reasons. *However, existing law provides that these state provisions regarding food containers are operative only to the extent they are identical to specified federal requirements.*

~~The act also prohibits a food container, subject to the Federal Food, Drug, and Cosmetic Act, from being made, formed, or filled as to be misleading. The act provides that a container that does not allow a consumer to fully view its contents violates this provision if it contains nonfunctional slack fill. The act provides that nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for other than specified reasons. However, existing law provides that these state provisions regarding food containers are operative only to the extent they are identical to specified federal requirements.~~

Existing law, the Sherman Food, Drug, and Cosmetic Law, also provides for the regulation by the State Department of Public Health of the packaging and labeling of foods, drugs, devices, and cosmetics, and provides requirements for containers containing these commodities that are similar to the requirements for containers under the Fair Packaging and Labeling Act.

~~Subject to the requirement that food containers conform to those federal requirements, the~~

This bill would instead define nonfunctional slack fill instead for all of these provisions as the empty space in a package that is filled to substantially less than its capacity for other than any one or more of the specified applicable reasons. Except with respect to food containers, the The bill would provide that slack fill in a package shall not be used as grounds to allege a violation of ~~specified~~ *the applicable* provisions based *solely* on its presence *in any of these types of packages* unless it is nonfunctional slack fill.

~~(2) Existing law, the Sherman Food, Drug, and Cosmetic Law, also provides for the regulation by the State Department of Public Health of the packaging and labeling of foods, drugs, devices, and cosmetics, and provides requirements for containers containing these commodities that are similar to existing requirements for containers under the Fair Packaging and Labeling Act.~~

~~The bill would define nonfunctional slack fill instead as the empty space in a package that is filled to substantially less than its capacity~~

~~for other than any one or more of the specified reasons referenced above. The bill would provide that slack fill in a package shall not be used as grounds to allege a violation of specified provisions based on its presence unless it is nonfunctional slack fill.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12606 of the Business and Professions
2 Code is amended to read:
3 12606. (a) No container wherein commodities are packed shall
4 have a false bottom, false sidewalls, false lid or covering, or be
5 otherwise so constructed or filled, wholly or partially, as to
6 facilitate the perpetration of deception or fraud.
7 (b) No container shall be made, formed, or filled as to be
8 misleading. A container that does not allow the consumer to fully
9 view its contents shall be considered to be filled as to be misleading
10 if it contains nonfunctional slack fill. Slack fill is the difference
11 between the actual capacity of a container and the volume of
12 product contained therein. Nonfunctional slack fill is the empty
13 space in a package that is filled to substantially less than its
14 capacity for reasons other than any one or more of the following:
15 (1) Protection of the contents of the package.
16 (2) The requirements of machines used for enclosing the
17 contents of the package.
18 (3) Unavoidable product settling during shipping and handling.
19 (4) The need to utilize a larger than required package or
20 container to provide adequate space for the legible presentation of
21 mandatory and necessary labeling information, such as those based
22 on the regulations adopted by the United States Food and Drug
23 Administration or state or federal agencies under federal or state
24 law, laws or regulations adopted by foreign governments, or under
25 an industrywide voluntary labeling program.
26 (5) The fact that the product consists of a commodity that is
27 packaged in a decorative or representational container where the
28 container is part of the presentation of the product and has value
29 that is both significant in proportion to the value of the product
30 and independent of its function to hold the product, such as a gift
31 combined with a container that is intended for further use after the

1 product is consumed, or durable commemorative or promotional
2 packages.

3 (6) An inability to increase the level of fill or to further reduce
4 the size of the package, such as where some minimum package
5 size is necessary to accommodate required labeling, discourage
6 pilfering, facilitate handling, or accommodate tamper-resistant
7 devices.

8 (7) The product container bears a reasonable relationship to the
9 actual amount of product contained inside, and the dimensions of
10 the actual product container, the product, or the amount of product
11 therein is visible to the consumer at the point of sale, or where
12 obvious secondary use packaging is involved.

13 (8) The dimensions of the product or immediate product
14 container are visible through the exterior packaging, or where the
15 actual size of the product or immediate product container is clearly
16 and conspicuously depicted on any side of the exterior packaging
17 excluding the bottom, accompanied by a clear and conspicuous
18 disclosure that the representation is the “actual size” of the product
19 or the immediate product container.

20 (9) The presence of any headspace within an immediate product
21 container necessary to facilitate the mixing, adding, shaking, or
22 dispensing of liquids or powders by consumers prior to use.

23 (10) The exterior packaging contains a product delivery or
24 dosing device if the device is visible, or a clear and conspicuous
25 depiction of the device appears on the exterior packaging, or it is
26 readily apparent from the conspicuous exterior disclosures or the
27 nature and name of the product that a delivery or dosing device is
28 contained in the package.

29 (11) The exterior packaging or immediate product container is
30 a kit that consists of a system, or multiple components, designed
31 to produce a particular result that is not dependent upon the
32 quantity of the contents, if the purpose of the kit is clearly and
33 conspicuously disclosed on the exterior packaging.

34 (12) The exterior packaging of the product is routinely displayed
35 using tester units or demonstrations to consumers in retail stores,
36 so that customers can see the actual, immediate container of the
37 product being sold, or a depiction of the actual size thereof prior
38 to purchase.

39 (13) The exterior packaging consists of single or multiunit
40 presentation boxes of holiday or gift packages if the purchaser can

1 adequately determine the quantity and sizes of the immediate
2 product container at the point of sale.

3 (14) The exterior packaging is for a combination of one
4 purchased product, together with a free sample or gift, wherein
5 the exterior packaging is necessarily larger than it would otherwise
6 be due to the inclusion of the sample or gift, if the presence of both
7 products and the quantity of each product are clearly and
8 conspicuously disclosed on the exterior packaging.

9 (15) The exterior packaging or immediate product container
10 encloses computer hardware or software designed to serve a
11 particular computer function, if the particular computer function
12 to be performed by the computer hardware or software is clearly
13 and conspicuously disclosed on the exterior packaging.

14 (c) Slack fill in a package shall not be used as grounds to allege
15 a violation of this section based solely on its presence unless it is
16 nonfunctional slack fill.

17 (d) Any sealer may seize a container that facilitates the
18 perpetration of deception or fraud and the contents of the container.
19 By order of the superior court of the county within which a
20 violation of this section occurs, the containers seized shall be
21 condemned and destroyed or released upon conditions the court
22 may impose to insure against their use in violation of this chapter.
23 The contents of any condemned container shall be returned to the
24 owner thereof if the owner furnishes proper facilities for the return.
25 A proceeding under this section is a limited civil case if the value
26 of the property in controversy is less than or equal to the maximum
27 amount in controversy for a limited civil case under Section 85 of
28 the Code of Civil Procedure.

29 SEC. 2. Section 12606.2 of the Business and Professions Code
30 is amended to read:

31 12606.2. (a) This section applies to food containers subject to
32 Section 403(d) of the Federal Food, Drug, and Cosmetic Act (21
33 U.S.C. Sec. 343(d)), and Section 100.100 of Title 21 of the Code
34 of Federal Regulations. Section 12606 does not apply to food
35 containers subject to this section.

36 (b) No food containers shall be made, formed, or filled as to be
37 misleading.

38 (c) A container that does not allow the consumer to fully view
39 its contents shall be considered to be filled as to be misleading if
40 it contains nonfunctional slack fill. Slack fill is the difference

1 between the actual capacity of a container and the volume of
2 product contained therein. Nonfunctional slack fill is the empty
3 space in a package that is filled to substantially less than its
4 capacity for reasons other than any one or more of the following:

5 (1) Protection of the contents of the package.

6 (2) The requirements of the machines used for enclosing the
7 contents in the package.

8 (3) Unavoidable product settling during shipping and handling.

9 (4) The need for the package to perform a specific function,
10 such as where packaging plays a role in the preparation or
11 consumption of a food, if that function is inherent to the nature of
12 the food and is clearly communicated to consumers.

13 (5) The fact that the product consists of a food packaged in a
14 reusable container where the container is part of the presentation
15 of the food and has value that is both significant in proportion to
16 the value of the product and independent of its function to hold
17 the food, such as a gift product consisting of a food or foods
18 combined with a container that is intended for further use after the
19 food is consumed or durable commemorative or promotional
20 packages.

21 (6) Inability to increase the level of fill or to further reduce the
22 size of the package, such as where some minimum package size
23 is necessary to accommodate required food labeling exclusive of
24 any vignettes or other nonmandatory designs or label information,
25 discourage pilfering, facilitate handling, or accommodate
26 tamper-resistant devices.

27 *(d) Slack fill in a package shall not be used as grounds to allege*
28 *a violation of this section based solely on its presence unless it is*
29 *nonfunctional slack fill.*

30 ~~(d)~~

31 *(e)* This section shall be interpreted consistent with the
32 comments by the United States Food and Drug Administration on
33 the regulations contained in Section 100.100 of Title 21 of the
34 Code of Federal Regulations, interpreting Section 403(d) of the
35 Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)),
36 as those comments are reported on pages 64123 to 64137, inclusive,
37 of Volume 58 of the Federal Register.

38 ~~(e)~~

39 *(f)* If the requirements of this section do not impose the same
40 requirements as are imposed by Section 403(d) of the Federal

1 Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any
2 regulation promulgated pursuant thereto, then this section is not
3 operative to the extent that it is not identical to the federal
4 requirements, and for this purpose those federal requirements are
5 incorporated into this section and shall apply as if they were set
6 forth in this section.

7 ~~(f)~~

8 (g) Any sealer may seize any container that is in violation of
9 this section and the contents of the container. By order of the
10 superior court of the county within which a violation of this section
11 occurs, the containers seized shall be condemned and destroyed
12 or released upon any conditions that the court may impose to ensure
13 against their use in violation of this chapter. The contents of any
14 condemned container shall be returned to the owner thereof if the
15 owner furnishes proper facilities for the return. A proceeding under
16 this section is a limited civil case if the value of the property in
17 controversy is less than or equal to the maximum amount in
18 controversy for a limited civil case under Section 85 of the Code
19 of Civil Procedure.

20 SEC. 3. Section 110375 of the Health and Safety Code is
21 amended to read:

22 110375. (a) No container wherein commodities are packed
23 shall have a false bottom, false sidewalls, false lid or covering, or
24 be otherwise so constructed or filled, wholly or partially, as to
25 facilitate the perpetration of deception or fraud.

26 (b) No container shall be made, formed, or filled as to be
27 misleading. A container that does not allow the consumer to fully
28 view its contents shall be considered to be filled as to be misleading
29 if it contains nonfunctional slack fill. Slack fill is the difference
30 between the actual capacity of a container and the volume of
31 product contained therein. Nonfunctional slack fill is the empty
32 space in a package that is filled to substantially less than its
33 capacity for reasons other than any one or more of the following:

34 (1) Protection of the contents of the package.

35 (2) The requirements of machines used for enclosing the
36 contents of the package.

37 (3) Unavoidable product settling during shipping and handling.

38 (4) The need to utilize a larger than required package or
39 container to provide adequate space for the legible presentation of
40 mandatory and necessary labeling information, such as those based

1 on the regulations adopted by the United States Food and Drug
2 Administration or state or federal agencies under federal or state
3 law, laws or regulations adopted by foreign governments, or under
4 an industrywide voluntary labeling program.

5 (5) The fact that the product consists of a commodity that is
6 packaged in a decorative or representational container where the
7 container is part of the presentation of the product and has value
8 that is both significant in proportion to the value of the product
9 and independent of its function to hold the product, such as a gift
10 combined with a container that is intended for further use after the
11 product is consumed, or durable commemorative or promotional
12 packages.

13 (6) An inability to increase the level of fill or to further reduce
14 the size of the package, such as where some minimum package
15 size is necessary to accommodate required labeling, discourage
16 pilfering, facilitate handling, or accommodate tamper-resistant
17 devices.

18 (7) The product container bears a reasonable relationship to the
19 actual amount of product contained inside, and the dimensions of
20 the actual product container, the product, or the amount of product
21 therein is visible to the consumer at the point of sale, or where
22 obvious secondary use packaging is involved.

23 (8) The dimensions of the product or immediate product
24 container are visible through the exterior packaging, or where the
25 actual size of the product or immediate product container is clearly
26 and conspicuously depicted on any side of the exterior packaging
27 excluding the bottom, accompanied by a clear and conspicuous
28 disclosure that the representation is the “actual size” of the product
29 or the immediate product container.

30 (9) The presence of any headspace within an immediate product
31 container necessary to facilitate the mixing, adding, shaking, or
32 dispensing of liquids or powders by consumers prior to use.

33 (10) The exterior packaging contains a product delivery or
34 dosing device if the device is visible, or a clear and conspicuous
35 depiction of the device appears on the exterior packaging, or it is
36 readily apparent from the conspicuous exterior disclosures or the
37 nature and name of the product that a delivery or dosing device is
38 contained in the package.

39 (11) The exterior packaging or immediate product container is
40 a kit that consists of a system, or multiple components, designed

1 to produce a particular result that is not dependent upon the
2 quantity of the contents, if the purpose of the kit is clearly and
3 conspicuously disclosed on the exterior packaging.

4 (12) The exterior packaging of the product is routinely displayed
5 using tester units or demonstrations to consumers in retail stores,
6 so that customers can see the actual, immediate container of the
7 product being sold, or a depiction of the actual size of the container
8 prior to purchase.

9 (13) The exterior packaging consists of single or multiunit
10 presentation boxes of holiday or gift packages if the purchaser can
11 adequately determine the quantity and sizes of the immediate
12 product container at the point of sale.

13 (14) The exterior packaging is for a combination of one
14 purchased product, together with a free sample or gift, wherein
15 the exterior packaging is necessarily larger than it would otherwise
16 be due to the inclusion of the sample or gift, if the presence of both
17 products and the quantity of each product are clearly and
18 conspicuously disclosed on the exterior packaging.

19 (c) Slack fill in a package shall not be used as grounds to allege
20 a violation of this section based solely on its presence unless it is
21 nonfunctional slack fill.

22 (d) Any sealer may seize a container that facilitates the
23 perpetration of deception or fraud and the contents of the container.
24 By order of the superior court of the county within which a
25 violation of this section occurs, the containers seized shall be
26 condemned and destroyed or released upon any condition as the
27 court may impose to ensure against their use in violation of this
28 chapter. The contents of any condemned container shall be returned
29 to the owner if the owner furnishes proper facilities for the return.